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14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA  
16 (Southern Division – Santa Ana)

17 PRESLIE HARDWICK,

18 Plaintiff,

19 vs.

20 COUNTY OF ORANGE, et al.,

21 Defendants.

Case No. SACV 13-1390 JLS (ANx)

PLAINTIFF’S MOTION FOR NEW  
TRIAL AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT

Hearing Date: August 18, 2017

Hearing Time: 2:30 p.m.

Courtroom: 10A

Judge: Hon. Josephine L. Staton

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Plaintiff respectfully submits the following motion for new trial:

**I. INTRODUCTION**

This case involved claims by Plaintiff that on February 17<sup>th</sup>, 2000, social workers Marcie Vreeken and Elain Wilkins lied to the juvenile dependency court in the County of Orange about events and statements allegedly made after a visitation on February 15<sup>th</sup>, 2000 between then-minor (6 yrs old) Plaintiff, her sister (9 yrs old), and their father Cary Hardwick. Plaintiff contended the false representations were the but-for cause of an immediate and traumatic removal on February 17<sup>th</sup> from her mother. [Dkt. 1]

Plaintiff additionally alleged that Defendant Vreeken withheld a March 31, 2000 letter and/or its contents about the severe emotional distress the children were suffering, from the juvenile dependency Court on that same date – despite the fact the letter was in the Courtroom and in Vreeken’s possession or control. The letter had been sent by a therapist for the children (Marjorie Mitchell PhD.) and addressed their severe psycho-emotional regression due to the separation from their mother. Plaintiff claimed this withholding of evidence was a but-for cause of failing to return Plaintiff. [Dkt. 1]

For both claims, Plaintiff sued Helen Dwojak (deceased, thus proper Defendant name “Estate of Helen Dwojak”) in her supervisory role over both

Vreeken and Wilkins. [Dkt. 1]

The trial was notable for the persistent and non-stop objectionable conduct of Defendants' counsel, often in bold and consecutively repeated defiance of the Court's rulings and admonitions. Examples include repeated efforts to introduce evidence of mental health experts involved with the family prior to juvenile court involvement, and repeated to the level of "theme" efforts to demonize the Plaintiff's mother ("Deanna"), including doing so in closing argument after being expressly told he would not be allowed to argue that the conduct of mother was the "cause" of the removal of the children.<sup>1</sup> [Declaration of

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<sup>1</sup> Related to the confusing and prejudicial statements allowed to be made by Defendants' counsel – regardless of the standard instruction made to the jury that statements of counsel are not evidence, is the denial of Plaintiff's MIL#1 (Dkt. 93). Therein, Plaintiff pointed out the obvious breadth of the claims – and previously denied by the 9<sup>th</sup> Circuit immunity defenses – Defendants' counsel was intending to make during trial as reasonably inferred from the 174 Exhibits the Defendants proposed (Dkt. 113 – only the last four Exhibits listed are Plaintiff's). Plaintiff offered in MIL #1 the suggestion that Defendants be ordered to provide some offer of proof per Exhibit, why family court proceedings running not less than 6 years *after* the removal of the children would/could have some bearing on the issues in this case, and why all transcripts from juvenile proceedings in which 3-4 hearings at most were relevant would have relevance. With that motion denied, the Defendants' counsel's opening statement was literally a recap of that six years of litigation, including the statements from §730 evaluators that were later not only denied into evidence by the Court, but proved to have never been in the possession of the Defendants prior to the removal of the children. Shortly after the opening statements and while not yet complete with the testimony of the first witness (Deanna Fogarty) the Court expressed concerns about these very same issues; scope of the trial, scope of the evidence, and the relevance of the mountain of evidence. [Dec.]

1 Plaintiff's Counsel [In Support].<sup>2</sup>

2 Defendants' counsel hammered the "length of the litigation," claiming it  
3 spanned 17 years, and stated in his opening statement as well as his closing  
4 argument that it "has to end." [Dec.] It was an emotive appeal to everything  
5 *other than the facts of the case that underlie the Plaintiff's claim*, and nothing in  
6 the sentiment constitutes a valid legal defense.  
7

8 The evidence was substantially in favor of Plaintiff prevailing on her  
9 claims. The credibility of the seminal witnesses for Defendants – which were  
10 the Defendants themselves - was non-existent. Uniquely, in this case, the  
11 inconsistency and lack of credibility was shown repeatedly in huge part through  
12  
13

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14 <sup>2</sup> Given that the only Declaration that will accompany this motion is the  
15 Declaration of Plaintiff's Counsel In Support Of Plaintiff's Motion For New  
16 Trial, it will hereafter merely be cited as "Dec." This will not be added to the  
17 end of every sentence, but at the end of a paragraph in most instances, and the  
18 particulars of the paragraph dealt with in the Declaration. Plaintiff finds no  
19 authority requiring the use of trial transcripts in a motion for new trial. Indeed  
20 the gravamen of such a motion and the Court's discretion in regard to such  
21 motions, is support enough for submission of the events of trial by declaration,  
22 as in the end such motions are ruled upon based on the Court being the "only  
23 objective person (with legal training) who was at the trial and able to see, hear,  
24 and evaluate the situation using firsthand knowledge[.]" (*Tortu v. Las Vegas*  
25 *Metro[] Police Dept.*, 556 F3d 1075, 1088 (9th Cir. 2009). A Court may order a  
new trial sua sponte, undercutting any claim a trial transcript is ever needed for a  
learned jurist who presided over the trial to rule on such motions. [*Copper v.*  
*City of Fargo*, 184 F3d 994, 997 (8th Cir. 1999), see also *Experience v. Hendrix*  
*LLC v. Hendrixlicensing.com Ltd.* 742 F3d 377, 390 (9th Cir. 2014) – district  
court not restricted to grounds party asserts regarding damages verdict but may  
sua sponte raise its specific concerns; *Pediatric Screening Inc. v. TeleChem*  
*Int'l, Inc.*, 602 F3d 541, 546 (3rd Cir. 2010)]

1 the Defendants' own prior sworn testimony used to impeach. [Dec.]

2 In addition to those glaring problems, the jury clearly did not review the  
3 evidence; they deliberated only approximately two hours. [Dec.] And, the  
4 conduct of Defendants' counsel along with the over-ruling of proper objections  
5 to Defendants' counsel's arguments and questioning-made-to-look-like-  
6 evidence allowed the jury to be improperly prejudiced and biased against  
7 Plaintiff and/or utterly confused as to the gravamen of the civil rights violation  
8 claims Plaintiff was making. [Dec.]

9 Prior to the start of trial, due in large part to the Court's allowing the six to  
10 seven year long post-juvenile court history to come into evidence by way of  
11 denial of the Plaintiff's Motion in Limine #1 (Dkt. 93), Plaintiff dismissed all  
12 claims for damages for any conduct of the Defendants occurring after March 31,  
13 2000; limiting damages to the damages suffered as a result of the removal from  
14 her mother on February 17, 2000, and the damages related to the act of judicial  
15 deception – by withholding of evidence – on March 31, 2000. [Dec.]

## 16 **II. JURY VERDICT WAS AGAINST CLEAR WEIGHT OF EVIDENCE**

17 Under FRCP Rule 59, a new trial may be ordered where the verdict is  
18 against the clear weight of the evidence.” [*Molski v. M.J. Cable, Inc.*, 481 F.3d  
19 724, 729 (9th Cir.2007)] In fact, a trial judge has a duty to set aside a verdict if

1 she is “of the opinion that the verdict is against the clear weight of the evidence,  
2 or is based upon evidence which is false or will result in a miscarriage of  
3 justice.” [*Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 594 (4th  
4 Cir.1985)] In ruling on a new trial motion based on insufficiency of evidence,  
5 the district court must weigh the evidence and assess for itself the credibility of  
6 witnesses. “It is clear that the district court judge had the right, and indeed the  
7 duty, to weigh the evidence as [she] saw it, and to set aside the verdict of the  
8 jury, even though supported by substantial evidence, where in [her]  
9 conscientious opinion, the verdict is contrary to the clear weight of the evidence,  
10 or . . . to prevent . . . a miscarriage of justice.” [*Murphy v. City of Long Beach*,  
11 914 F.2d 183, 187 (9th Cir.1990)] In doing so, there is no presumption that the  
12 verdict is correct, and the judge does not need to view the evidence in the light  
13 most favorable to the party in whose favor the verdict was rendered. [*Landes*  
14 *Const. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir.1987)]

15 Here, Plaintiff submits the verdict is against the clear weight of the  
16 evidence on the following issues: 1) whether Deanna Fogarty made a comment  
17 on February 15, 2000 to the effect of, “your Dad is trying to take you away and  
18 put you in foster care,” and the related converse, whether in fact it was Marcie  
19 Vreeken who said something to the children about being taken away from  
20  
21  
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Deanna and going to “foster care” and then lied about both (in addition to lying in a Second Amended Petition filed for February 23, 2000 (Ex. F<sup>3</sup>) about both); 2) whether these actions/inactions, and the withholding of the March 31, 2000 letter from the children’s therapist Marjorie Mitchel PhD. were civil rights violations based on “judicial deception;” and 3) whether the juvenile court’s removal “forthwith” on February 17, 2000 was attributable in a legally sufficient “but for” manner to the judicial deception by Defendants Vreeken and Wilkins, and the continued detention of the Plaintiff (this claim not as to Wilkins) in foster care on March 31, 2000 occasioned by failing to disclose to the Court the letter from Dr. Mitchell, or convey its contents about the psychologically traumatized children to the juvenile court judge.

Plaintiff requests that a new trial be held on all issues. [Rule 59(a)]

**A. Clear Weight of the Evidence Showed That Deanna Did Not Make The Comment That Spurred Removal; Vreeken Did**

Plaintiff reiterates the holding in *Murphy*, that the district court has, “the right, and indeed the duty, to weigh the evidence as [she] saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where in [her] conscientious opinion, the verdict is contrary to the clear weight of the evidence, or . . . to prevent . . . a miscarriage of justice.” This standard holds

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<sup>3</sup> Vreeken included B-5 & C-6, claiming under oath Wilkins heard the statement.

1 the court to, “assess for itself the credibility of witnesses.” [Rutter Grup, Fed  
2 Civil Tr & Evid, 20:103] There is no presumption a verdict is correct. [*Landes*  
3 *Const. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1371 (9th Cir.1987)]  
4

5 This case was marked by repeated statements under oath in trial by Marcie  
6 Vreeken that were contradicted on the record by reading from her own prior  
7 testimony under oath. The impeachments of Vreeken came from the March  
8 2000 juvenile court trial, an event that occurred within 6 weeks of the actual  
9 events at issue. Plaintiff puts the number of statements under oath contradicted  
10 by Vreeken’s own prior testimony conservatively at twenty in number. The  
11 impeachment literally would follow question after question at times during  
12 Vreeken’s direct examination. [Dec.] The Court admitted Exhibits 19, 20, and  
13 21, transcripts of the juvenile proceedings for March 29, 30, and 31, 2000, and  
14 these were used extensively to impeach Vreeken. [Dec.; Note: herein those  
15 Exhibits are attached as A, B, and C respectively. Bates numbers in the lower  
16 right of all pages match the Exhibit List as maintained by the Court in trial.<sup>4</sup>]  
17  
18  
19

20 An extremely weighty piece of evidence that would have to have been  
21 completely ignored by the jury, came straight from Kendall’s mouth to her  
22 therapist Marjorie Mitchell PhD., reported by the doctor on a February 16<sup>th</sup>  
23

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24  
25 <sup>4</sup> In citing page numbers from a transcript Exhibit, PDF numbers in the lower  
right hand corner will be used for the “pages” not page number on document.

1 session, smack between the visit and the day of the removal,

2 “Kendall was very distraught today and ruminated over being put into  
3 another home, like a foster home. Reportedly after she cried and  
4 protested about seeing her father the new social worker, “*Marcie*”  
5 *threatened to send them to a foster home.*” [Ex. D]

6 Vreeken in her trial testimony herein, and her juvenile court trial testimony  
7 back in March of 2000, acknowledged that she supplied the children with all  
8 they needed for Preslie to come into the room her mother occupied, crying all  
9 the while Vreeken had talked about their dad and going to foster care;

10 1) “Q. Did you say anything to Kendall during those five minutes or so  
11 before you and Kendall went over to where her mother was that  
12 evening? A: She asked me, “Where do kids go?” And I explained to her  
13 that she’s with her mom and some kids go to foster home and some  
14 kids go to group homes, but she’s with her mom.” [Ex. C, 41:4-10, see  
also Ex. B, 4:11-16]

15 2) “Q. Did you say anything to [Kendall] that a judge could place a  
16 child in foster care? A. Yes” [Ex. B, 5:21-23]

17 3) “Q. Did the mother make a statement to you when you walked in,  
18 basically, inquire of you why you had told her children that you were  
19 going to take them away from her that evening, something to that  
effect? A. She made statements yes.” [Ex. A, 66:17-26]

20 Each of these facts was shared with the jury during Vreeken’s testimony,  
21 and in closing argument. Also, no one refuted Deanna’s statements upon  
22 Vreeken entering the room she was in on February 15<sup>th</sup>. Why would Deanna say  
23 that but-for Preslie ran in and related what Vreeken had said? The evidence is  
24  
25

1 simply overwhelming; the rational conclusion compelling. This jury spent only  
2 about two hours in deliberations, and clearly ignored all of this evidence despite  
3 the fact it was all provided to them in testimony, and in hard copy evidence in  
4 their possession.<sup>5</sup> That is the definition of a “miscarriage of justice.”

6 The jury was also told through Vreeken’s live testimony, and it was in  
7 Exhibit C (33:16-20), both children in a subsequent Vreeken interview said they  
8 did not hear their mother say anything about their father threatening to take them  
9 and put them in a foster home. [Dec.]

11 Another weighty piece of evidence that supports the utter fabrication of  
12 Vreeken and Wilkins’ claim that Deanna made the alleged comment, is the fact  
13 that nowhere in Vreeken’s report submitted the 17<sup>th</sup> of February 2000, does she  
14 say a single word about this alleged statement by Deanna; *not a word* about this  
15 alleged incident or statement February 15<sup>th</sup> is mentioned. [Ex. B, 10:19-24]

17 Another telling sign of an utter lack of credibility was when Elaine Wilkins  
18 was on the stand, and asked if after reviewing any of the documents she  
19 reviewed for trial, or evidence heard thus far in trial, anything had returned to  
20 her memory, or her memory had been refreshed about anything regarding the  
21 events on February 15, 2000. Notable here was that Wilkins had just heard the  
22

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24  
25 <sup>5</sup> The three transcripts, A, B, and C, total 215 pages. The jury would have to  
have read them at a rate of more than 3 pages a minute; unlikely at best.

1 Court say that Rosie Reales was not going to be allowed to testify. [Dec.] Not  
2 surprisingly, she then claimed two things she recalled some 17 years after the  
3 events of February 2000: 1) Rosie Reales *definitely* was not in the room when  
4 she claimed to have heard Deanna say words to the effect of, “Your dad is trying  
5 to take you [kids] away and put you in foster care,” and 2) she remembered how  
6 violent and out of control Deanna was when she came out of the bathroom,  
7 saying she felt severely threatened. [Dec.] The Court hopefully recalls – for one  
8 cannot “see” it in a transcript – the smug look on Ms. Wilkins face when she  
9 announced her clear recollection Ms. Reales was not in the room. Thinking  
10 Rosie Reales wouldn’t be there to contradict her amazing recollection  
11 emboldened Elaine Wilkins to lie on the stand. Practice makes perfect!

15 Briefly, Plaintiff will address the 2<sup>nd</sup> of Wilkins “recovered memories.”  
16 Vreeken testified – again, using her juvenile trial testimony from March to  
17 impeach her along the way because, like Wilkins, she made Deanna out to be  
18 histrionically out of control and putting Vreeken in “fear” – that, Deanna’s  
19 hands weren’t in a position to strike or hit her, and that she was just flailing her  
20 hands in a manner that fit her emotional state. [Dec.; Ex. C 27:14-28:9] This  
21 was a stark contrast to the manner that Vreeken and Wilkins were now, in trial,  
22 trying to portray Deanna – clearly the target of the defense - there being really  
23  
24  
25

1 no other target than making out Deanna as a lying, scheming ex-wife for the  
2 purpose of confusing the jury on the issues in the case.

3  
4 Wilkins had testified in this trial – by way of her deposition transcript from  
5 the *Fogarty v. County of Orange* trial<sup>6</sup> being read into the record (Dec.)– to all  
6 of the following important points about February 15, 2000,

7 - She heard “the daughter [Preslie] telling mother as to what was going on  
8 with her dad and with the social worker[,]” she could not state verbatim what  
9 was said; she didn’t recall anything the child said.

11 - Described the children, during the visit with father just before the claimed  
12 comments about “foster care” by Deanna, as “very happy to be there.”

14 - Marcie Vreeken talked with kids after visit, and agreed that was “when  
15 Kendall started tearing up.” She testified Kendall looked frightened and upset,  
16 and knew of nothing else other than something Vreeken said, that could have  
17 made her frightened and upset. She did not however, remember a single thing  
18 Vreeken said to the girls; not one.

20 - Testified she left the play room, where Vreeken was talking to the  
21 children (specifically Kendall), before Vreeken left the room, however Vreeken  
22 testified Wilkins remained in the playroom after she and Kendall left that room  
23

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25 <sup>6</sup> For reference, though not an admitted Exhibit, testimony taken direct from pp  
819-832, trial transcript *Fogarty-Hardwick v. County of Orange*. [Dec.]

1 and headed to the room Deanna and Ms. Reales were in. Vreeken in fact, said  
2 that Wilkins – who claims to have heard Deanna make this comment – was a  
3 “minute or two” behind her. [Ex. A, 60:14-25]<sup>7</sup>  
4

5 - She agreed she did not know what, if anything Preslie may have said to  
6 her mom before entering the room the mother was in, that she had followed  
7 Preslie to, where she didn’t recall Rosie Reales present, but it was “possible.”  
8 Vreeken on the other hand, didn’t hesitate in acknowledging Rosie Reales was  
9 in the room with Deanna! [Ex. A, 59:15-18; 64:11-18; 72:22-73:2] Vreeken  
10 testified Rosie was in the room the entire time! [*Id.* 71:9-72:24]  
11

12 - Wilkins knew of *no evidence other than her claims* given to the juvenile  
13 court on February 17, 2000, that Deanna told the children that their father was  
14 trying to take the children away.  
15

16 Further as to the violation of Plaintiff’s rights related to the withholding of  
17 the Marjorie Mitchell PhD. letter of March 31, 2000 (Ex. D) at the hearing,  
18 Plaintiff points out again Vreeken’s lack of credibility, and the facts which so  
19 clearly made that act of omission an act of judicial deception.<sup>8</sup>  
20  
21

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22 <sup>7</sup> That makes the claim Wilkins heard something Vreeken claims she did not,  
23 beyond untenable and into fantastical – or simply lying on the part of both  
24 Defendants about the alleged comment by Deanna.

25 <sup>8</sup> There was a stark example of Ms. Vreeken’s vascillating tendencies from the  
juvenile court hearing on March 30<sup>th</sup>, 2000, which reads, “Q: You testified  
yesterday that you saw the children coming out of the rest room with mother.  
12

1 First, Vreeken testified in this trial that the Judge was given the letter;  
2 literally it was handed to him and he read it. Vreeken testified she remembers  
3 clearly how the Judge in that hearing (March 31, 2000, Ex. C) asked her to  
4 follow up with Dr. Mitchell on the content of the letter, after it was discussed in  
5 Court. [Dec.] No surprise, the transcript reveals both of these statements are  
6 utter fabrications. Following, is the discussion by the Court with Vreeken on  
7 March 31, 2000, prompted by an inquiry from Deanna's counsel Mr. Hermes,  
8  
9

10 **"The Court:** Mr. Hermes, I believe you still have a few questions, if  
11 you'd like to proceed. **Mr. Hermes:** Yes, a few. I'd like to address the  
12 court on another matter before it gets too late, and I know Mr. Stapleton  
13 has to leave at 4 o'clock. It's my understanding -- yesterday we talked  
14 about an oral motion to remove the kids back to mother, and we heard  
15 the court's comments about the need for some kind of evidentiary basis.  
16 It's my understanding that Dr. Mitchell has talked to Ms. Vreeken, and  
17 I thought that she had submitted a report. It was also my understanding  
18 from a message left on our answering machine to get a hold of Ms.  
19 Vreeken, that the kids were not doing well, and she wanted to talk to  
20 Ms. Vreeken about something, and I would like to know if we could  
21 maybe take it up in the next five minutes. [If] [t]here is a problem, we'd  
22 like to know about it, so maybe we can make another motion to this  
23 court, if the kids are in some type of extreme emotional state that would  
24 require the court to intervene. We haven't received a copy of any letter  
25 or know from Ms. Vreeken what was said in her discussion with Dr.  
Mitchell. I think it would be very important to take care of that if there  
is a problem before we leave for the day. **The Court:** *Do we have some  
information from again, I guess we're also talking about talking to  
people, the foster home and Dr. Mitchell and things like that. Is that*

24 Was that incorrect? A: Yes. Q: So you didn't see mother coming out of the  
25 restroom with the two children that evening? A: No." [Ex. B, 14:15-20]



1        *what you're talking about? Mr. Hermes: Yes. I don't know if Dr.*  
2        *Mitchell's talked to people in the foster home or what she's done, but I*  
3        *know she's interviewed the children, and I would just like to know if*  
4        *there's something we should deal with today based on the opinion of*  
5        *Ms. Vreeken before it gets too late. The Court: I hate to say that I*  
6        *assume that if that is a problem that they would bring that up, and that*  
7        *the agency would have done so. Ma'am, if you had that kind of a*  
8        *situation you would bring it to the court's attention? The Witness: Yes.*  
9        *The Court: And in not bringing it to the attention of the court at this*  
10       *time, does that mean that at this time you don't feel that you have a*  
11       *situation where we need to act on something right this minute? The*  
12       *Witness: Yes."* [ex. C, 65:17-67:17 – *emphasis added*]

13       Does that sound like a judge who had just read a letter that described  
14       Preslie as “angrily acting out,” and her sister Kendall “tearful” throughout visits,  
15       and “cling[ing]” to her prior to leaving, showing signs of “extreme emotional  
16       lability,” or signs of “emotional regression?” [Ex. D] Why would someone who  
17       read that letter need to ask such questions? They wouldn’t; another Vreeken lie.

18       Vreeken’s adamant claim in trial about the judge asking her to follow-up  
19       with Dr. Mitchell can’t be shown to the Court in the transcript, *but only because*  
20       *it does not exist.* [Dec.; Ex. C, 67:7-77:7 – content after exchange with Court]

21       The jury’s verdict was clearly against, the clear weight of the evidence,  
22       indeed it defied the evidence, and may well have been due in part to the  
23       confusing, distracting, prejudicial and misleading claims of Defendants’  
24       counsel, which will be addressed later herein.  
25

1           **B.    The Comments Falsely Attributed To Deanna By Defendants,**  
2           **Were The But-For Cause Of The Children's Removal**

3           It is also inescapable when considering the clear weight of the evidence,  
4           that the lie about the alleged statement by Deanna was what triggered the  
5           removal order. Since the jury did not get past the violation of rights for either  
6           the conduct or submissions of a false Amended Petition on the 17<sup>th</sup> of February,  
7           or the violation related to withholding the information in the March 31, 2000  
8           letter from Dr. Mitchell at the hearing of that date, Plaintiff will not cover  
9           extensively the fact that the clear weight of the evidence also showed that the  
10          fraud on the Court by Vreeken and Wilkins was the but-for cause of the removal  
11          order, but some coverage is deserved.  
12

13          When providing the “facts” upon which Vreeken was requesting a new  
14          amended Petition be filed, she wrote on her Application for Petition that the very  
15          reason (“due to”) for the removal order of the Court on February 17, 2000, was  
16          mother’s negative statements/threats to the children that their father was trying  
17          to take them away and put them in foster care. [Dec., Ex. G (104-373)] How did  
18          she come to this conclusion? The same way anyone of reasonable intelligence  
19          in that courtroom would have understood the events of that day! It is abundantly  
20          clear from the statements of the court during that very hearing (February 17,  
21          2000), and subsequent comments of the court during the subsequent jurisdiction  
22          order, but some coverage is deserved.  
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1 trial on March 31, 2000 that were also in evidence, that the alleged statements  
2 by Deanna drove the removal order. Plaintiff does not dispute this result was  
3 supported by Vreeken's failure to say anything at all about the problems she  
4 herself was concerned about with regard to Mr. Degadillo continuing as a  
5 monitor in the case. First, Plaintiff addresses the comments of the court at the  
6 "removal" hearing which lay bare this truth.  
7

8  
9 Exhibit E is the transcript of the February 17, 2000 hearing. The first thing  
10 to note is the court came out of the off-the-record conversation by saying it had  
11 a "discussion with Marcie Vreeken regarding some observations that the worker  
12 made in the case." [*Id.* 2:26-3:3] The very next sentence out of the judge's  
13 mouth was, "And I have indicated to counsel *the Court's inclination is to order*  
14 *social services to move the children from the mother's care pending the next*  
15 *hearing.*" [*Id.* 3:3-6 – emphasis added]<sup>9</sup> After brief argument by mother's  
16 counsel, the judge directly asks only two questions of anyone (that matter),  
17  
18

19 "The Court: Ms. Vreeken, your comment was that the mother had told  
20 the children in someone's presence that the father was trying to take  
21 the children away from her? Ms. Vreeken: Yes. The Court: And who  
22 was the person that was present when that statement was made? Ms.  
Vreeken: Elaine Wilkins. The Court: Is that the lady that's sitting

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23 <sup>9</sup> Note that mother's counsel clarified what Vreeken said in the off-the-record  
24 discussion, and it did not include missed visits or phone calls, saying, "The only  
25 information she imparted to the Court and counsel was information that allegedly another social worker had observed which my client vehemently denies at this time." [*Id.* 3:25-4:5] No one disputed this characterization.

1 next to you? Ms. Vreeken: Yes. The Court: Ma'am, is that what was  
2 said? Ms. Wilkins: Yes.” [Ex. E, 4:20-5:5]

3 The Court didn't ask a single other question of Vreeken or Wilkins.<sup>10</sup> In  
4 fact the Court concluded by saying to Deanna,

5 “We are going to have a trial on the 28<sup>th</sup>. And it may well be that you  
6 are right and you didn't say these things, but from the evidence I have  
7 *before me right now*, it looks like you are. [ . . . ] I have got to do that  
8 [removal] today, too, based on what I have *before me right now*.” [Ex.  
E, 12:24-13:4, *emphasis added*]

9 The Court didn't talk about a missed visit when discussing what it had in  
10 front of it “right now.” The Court pointed to nothing but the “statement”  
11 Wilkins and Vreeken had completely fabricated.  
12

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15 <sup>10</sup> There was some discussion in this trial about mother calling around about  
16 Hector Delgadillo, a visitation monitor, but that flame of the Judge's discontent  
17 blew out quickly when the Judge realized in Court on February 15, 2000 that the  
18 mother was NOT in court at the prior 2/8/17 hearing where he *believed he had*  
19 *mentioned Delgadillo* (Ex. E, 9:10-12). The February 8, 2000 transcript (Ex. H)  
20 is devoid of any statements about Hector Delgadillo. And to the extent  
21 Defendants might argue the incomplete visit of the 13<sup>th</sup> of February was the  
22 difference that led to removal (to attempt to minimize the “but-for” cause  
23 argument), the Court is reminded that Plaintiff also showed in closing argument  
24 the portion of the Ex. C – 3/31/00 transcript in which the juvenile court clearly  
25 stated that knowing if the children didn't want to visit their father because of  
Mr. Delgadillo's presence *was relevant to the court*, and THAT was but another  
piece of information withheld from the court by Vreeken. [*Id.* 39:2-41:8] She  
knew on February 15<sup>th</sup> of problems with Mr. Delgadillo and the “whispering  
incident” at a prior visit, and felt it appropriate to change monitors. [Ex. A,  
53:12-19, 54:5-18] Yet she said nothing to the Court on February 17, 2000 to  
apprise the Court of her concerns, or at any time. [Ex. E; Ex. C, 36:25-38:22]

1 **III. DEFENSE COUNSEL MISCONDUCT WARRANTS A NEW TRIAL**

2 Rule 59(a) of the Federal Rules of Civil Procedure provides a court may  
3 grant a new trial “for any reason for which a new trial has heretofore been  
4 granted in an action at law in federal court.” Rule 59 does not specify the  
5 grounds on which a motion for new trial may be granted; instead, the court is  
6 “bound by those grounds that have been historically recognized.” *Zhang v. Am*  
7 *Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir.2003) A new trial may be  
8 granted if, after weighing the evidence *as the court saw it*, “the verdict is  
9 contrary to the clear weight of the evidence, is based upon false or perjurious  
10 evidence, or to prevent a miscarriage of justice.” *Molski v. M.J. Cable, Inc.*, 481  
11 F.3d 724, 729 (9th Cir.2007).

12 Additionally, the Court has broad discretion to grant a motion for new trial  
13 for “grievous misconduct” of trial counsel. *Landes Const. Co. v. Royal Bank of*  
14 *Canada*, 833 F.2d 1365, 1371-72 (9th Cir.1987) A new trial should be granted  
15 where “the flavor of misconduct . . . sufficiently permeate[s] an entire  
16 proceeding to provide conviction that the jury was influenced by passion and  
17 prejudice in reaching its verdict.” *Settlegoode v. Portland Public Schools*, 371  
18 F.3d 503, 516-17 (9th Cir.2004). “A trial judge must determine where advocacy  
19 ends and appeals to bias and prejudice begin by examining the ‘cumulative  
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1 *thrust* of [defendants’] counsel’s argument.’” [*Ballarini v. Clark Equipment Co.*,  
2 841 F.Supp.662, 666 (E.D.Penn. 1993) - new trial ordered due to prejudicial  
3 comments and improper conduct of the plaintiff’s counsel over the objection of  
4 opposing counsel and contrary to court instruction, *emphasis added*)]

5  
6 Where the case is close, the misconduct is related to an issue central to the  
7 case, and no steps were taken to mitigate the effects of the error, a new trial is  
8 warranted. *Caudle v. District of Columbia*, 707 F.3d 354, 361 (D.C.Cir.2013). In  
9 *Caudle*, the circuit court held that a new trial should be ordered due to a series of  
10 inappropriate comments by the plaintiffs’ counsel asking the jury to put  
11 themselves in the plaintiffs’ shoes. “Counsel has an obligation –as Justice  
12 Holmes put it – to ‘play the game according to the rules.’ Here, the appellees’  
13 counsel did not.” [*Id.* at 363]

14  
15  
16 In Defendants’ counsel’s opening statement he went deeply into claims  
17 about involvement of three “730 evaluators” in the juvenile proceedings, who he  
18 claimed had various disparaging things in their evaluation reports about Deanna.  
19 Defendants’ counsel did this, despite the fact that Plaintiff’s claims had been  
20 narrowed to the damages from Defendants’ conduct only as occurring through  
21 March 31<sup>st</sup>, and none of these “evaluators” (with the exception of Howell), had  
22 done anything with the Plaintiff or her family prior to that date that was not at  
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1 least two years prior! As the evidence clearly showed during trial, it was  
2 indisputable that not a single document from these 730 evaluators (Howell,  
3 Johnson, Rogers) had ever been made part of the juvenile record, which  
4 consisted of reports written by social workers, including Vreeken. [Dec.]  
5 Indeed, the evaluators' reports, other than a much earlier (in the family law case)  
6 evaluation by Dr. Howell, had not even occurred in the operative time period.  
7 Plaintiff's counsel attempted to object, but it was overruled. Topping all of this  
8 off, Vreeken herself testified that on March 31, 2000, she had never spoken to  
9 Dr. Howell or Dr. Johnson. [Ex. C, 70:14-17]

12 The Court gave a "limiting instruction" addressing the narrowing of the  
13 scope of the trial only after this had occurred, an acknowledgment of sorts that  
14 such statements were improper. However, the instruction included with regard  
15 to the statements of counsel in opening argument, that "certain evidence  
16 mentioned in the opening statement is now not relevant to your decision in the  
17 case[,] [f]or that reason you will not hear all of the evidence that was referenced  
18 in the opening statements." [Dkt 160, pp 21, Jury Instruction 17] But the fact of  
19 the matter is that with the narrowing of the claims which occurred *before*  
20 opening statements, the repeated references to Drs. Howell, Johnson, and Rogers  
21 were never relevant, and the objections made at the time should have been  
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1 sustained.

2 Then *during the trial*, Defendants’ counsel made repeated efforts to  
3 introduce evidence of the opinions, conclusions, and/or findings of these after-  
4 the-fact 730 evaluations. On one occasion, immediately after a discussion with  
5 the Court outside the presence of the jury, during which Defendants’ counsel  
6 was expressly told that he would not be allowed to go into these areas, he  
7 literally asked questions covering the prohibited matters – and like so many  
8 questions Defense counsel asked they were loaded with the “facts” he wanted to  
9 get across to the jury – not less than four times in a row! Plaintiff objected, and  
10 the Court sustained the objections, but the continued practice of loading the  
11 “question” with the points – irrelevant or not – that Defendants’ counsel wanted  
12 to convey – went on the entire trial! At no point was Defendants’ counsel  
13 admonished about this conduct. Indeed, when Plaintiff’s counsel early on  
14 brought up – by objection - the leading and grossly hyperbole-filled questions of  
15 Defendants’ counsel, he was still allowed to continue time after time after time  
16 with questions in which he inserted facts without foundation and expressed as  
17 fact, whether fact at all, and/or whether or not a fact in evidence! The  
18 objections were overruled repeatedly. [Dec.]

19 Then, in another discussion outside the presence of the jury just prior to the  
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1 close of evidence and oral arguments, Defendants’ counsel was admonished that  
2 he would not be allowed to argue the conduct of Deanna as a “cause” of the  
3 removal of the children, with the Court properly advising counsel that there was  
4 no “comparative fault” arguments allowed in 42 U.S.C. 1983 actions. [Dec.]

5  
6 No sooner, did oral argument commence than Defendants’ counsel went  
7 directly to arguments exactly based on the conduct of Deanna as the cause for  
8 the children’s removal. Again, Plaintiff’s counsel objected, two separate times,  
9 and each time the objections were again overruled. [Dec.]

10  
11 The conduct of Defendants’ counsel was by any measure nothing more  
12 than an “appeal[] to bias and prejudice,” and was transparently the ‘*cumulative*  
13 *thrust*,’ of [defendants’] counsel’s arguments.

14  
15 Another stark example of the lengths to which Defendants’ counsel would  
16 go to confuse the jury, was the handling of an issue regarding returning the  
17 children to Orangewood after they had been moved a few days before March  
18 22<sup>nd</sup>, 2000 to a foster care placement with a lady named Cheryl Gibson.

19  
20 Defendants’ counsel argued in opening statement that “mother” “Deanna” had  
21 insisted that the children be sent back to Orangewood; he made the same  
22 arguments during trial in his questioning. [Dec.] The transparent point was to  
23 make an argument that the mother’s desiring that result meant Orangewood  
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25

1 couldn't be that bad for the girls. Yet, Defendants' counsel had included in the  
2 many, many Exhibits submitted for possible use in the trial, the transcript of the  
3 March 22<sup>nd</sup>, 2000. But then when one looks at the transcript for March 22<sup>nd</sup>,  
4 2000, which is included in the Declaration of Plaintiff's Counsel as Exhibit I,  
5 you see that everyone, the County, the mother's attorney, the father's attorney,  
6 and even the minor's attorney, agreed that the children should be moved back to  
7 Orangewood for obvious reasons of transportation to the foster care placement  
8 that was miles away from the parent's homes. This was but another of the  
9 deceitful presentations, repeated ad nauseum, by Defendants' counsel which  
10 could have no other effect than to prejudice and confuse the jury!

11 All of this conduct led to a trial that was not fair, that cultivated a verdict in  
12 contradiction to the clear weight of the evidence, and Plaintiff respectfully  
13 requests that the Court order a new trial on all issues.

### 14 **III. CONCLUSION**

15 On the basis of the foregoing arguments and evidence, Plaintiff respectfully  
16 requests that this Court order a new trial on all issues.

17 **RESPECTFULLY SUBMITTED,**

18 Dated: July 5, 2017

19 /S/ Robert R. Powell  
20 ROBERT R. POWELL, ESQ.  
21 Attorney for Plaintiffs  
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